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No. _____

Supreme Court, U.S.
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IN THE
Supreme Court of the United States
OCTOBER TERM, 1986

THE CITY OF MONTGOMERY;
EMORY FOLMAR, Mayor; and CHARLES SWINDALL,
Petitioners,

v.

LONNIE BENJAMIN; and
HAROLD HICKEN,
Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

H. BARTOW FARR, III *
ONEK, KLEIN & FARR
2550 M Street, N.W.
Suite 350
Washington, D.C. 20037
(202) 775-0184

GEORGE B. AZAR
AZAR, CAMPBELL & AZAR
260 Washington Avenue
Montgomery, AL 36197

N. GUNTER GUY, JR.
City Attorney
City Hall
Montgomery, AL 36104

Counsel for Petitioners

* Counsel of Record

WILSON - EPES PRINTING CO., INC. - 789-0096 - WASHINGTON, D.C. 20001

QUESTIONS PRESENTED

1. Whether the privilege against self-incrimination prohibits the dismissal of police officers for refusing to testify voluntarily about investigations that were part of their official duties?

2. Whether the privilege against self-incrimination, like rights under other constitutional provisions, may be required to yield when its assertion prevents a public employee from carrying out the legitimate obligations of his job?

TABLE OF CONTENTS

	Page
QUESTIONS PRESENTED	i
TABLE OF AUTHORITIES	iv
STATEMENT	2
a. The Todd Road Incident	2
b. The Worrie Taylor Hearing and Trial	3
c. The Proceedings Below	5
REASONS FOR GRANTING THE WRIT	6
1. The Decisions of this Court Do Not Prohibit a Government From Dismissing an Employee for Refusing to Perform a Necessary Part of His Job	7
2. The Proper Test for Assessing Claims Under the Fifth Amendment Requires An Inquiry Into Whether Assertion of the Privilege Will Significantly Interfere With Discharge of Public Duties	17
CONCLUSION	22

TABLE OF AUTHORITIES

CASES — Page

Adams v. Dept. of Transportation, FAA, 735 F.2d 488 (Fed. Cir. 1984) 16
Alcaraz v. Block, 746 F.2d 593 (9th Cir. 1984) 16
Arnett v. Kennedy, 416 U.S. 134, 168 (1974) 18
Baron v. Maloni, 602 F. Supp. 614 (W.D.N.Y. 1985) 21
Baxter v. Palmigiano, 425 U.S. 308 (1976) 12, 16
Book v. United States Postal Service, 675 F.2d 158 (8th Cir. 1982) 16
Bowman v. Pulaski County Special School District, 723 F.2d 640 (8th Cir. 1983) 19
Branti v. Finkel, 445 U.S. 507 (1980) 7, 12, 19
Brinks, Inc. v. City of New York, 717 F.2d 700 (2d Cir. 1983) 16
Broadrick v. Oklahoma, 413 U.S. 601 (1973) 8, 19
CSC v. Letter Carriers, 413 U.S. 548 (1973) 8, 18, 19
Connick v. Myers, 461 U.S. 138 (1983) 7, 8, 18, 20
Ex Parte Curtis, 106 U.S. 371 (1882) 18
Gardner v. Broderick, 392 U.S. 273 (1968) 5, 6, 7, 9, 12, 15
Garrity v. New Jersey, 385 U.S. 493 (1967) 4, 5, 6, 7, 8, 9, 10, 11, 12, 20
Grossart v. Dinaso, 758 F.2d 1221 (7th Cir. 1985) 9, 18
Kastigar v. United States, 406 U.S. 441 (1972) 16
Kelley v. Johnson, 425 U.S. 238 (1976) 8, 21
Konigsberg v. State Bar of California, 353 U.S. 252 (1957) 12
Lefkowitz v. Cunningham, 431 U.S. 801 (1977) 7, 9, 15, 17
Lefkowitz v. Turley, 414 U.S. 70 (1973) 7, 9, 12, 15
Minnesota v. Murphy, 104 S. Ct. 1136 (1984) 12
NLRB v. Alexander, 595 F.2d 458 (1978) 11
Pickering v. Board of Education, 319 U.S. 563 (1968) 18
O'Brien v. DiGrazia, 544 F.2d 543 (1st Cir. 1976), *cert. denied*, 431 U.S. 914 (1977) 21
Ortega v. O'Connor, 746 F.2d 703 (9th Cir. 1985), *cert. granted*, No. 85-530 22

TABLE OF AUTHORITIES—Continued

	Page
Otten v. Schicker, 655 F.2d 142	21
Reeder v. Kansas City Board of Police Commissioners, 733 F.2d 543 (1984)	21
Ryan v. Montana, 580 F.2d 998 (9th Cir. 1978)	15
Selective Service System v. Minnesota Public Interest Research Group, 104 S. Ct. 3348 (1984)	16
Shawgo v. Spradlin, 701 F.2d 470 (5th Cir.), *cert. denied sub nom. Whisenhunt v. Spradlin*, 104 S. Ct. 404 (1983)	21
Slochower v. Board of Education, 350 U.S. 551 (1956)	12
Suzuki v. Yuen, 617 F.2d 173 (9th Cir. 1980)	16
Uniformed Sanitation Men. Assoc. v. Commissioner of Sanitation, 392 U.S. 280 (1968)	5, 6, 7, 9, 12, 15
United States v. Indorato, 628 F.2d 711 (1st Cir. 1980)	9
Vicksburg Firefighters Ass'n v. City of Vicksburg, 761 F.2d 1036 (5th Cir. 1985)	19
Wieman v. Updegraff, 344 U.S. 183 (1952)	11
Wilton v. Mayor and City Council of Baltimore, 772 F.2d 88 (4th Cir. 1985)	19
STATUTES AND REGULATIONS:	
28 U.S.C. § 1254(1)	2

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v.

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HAROLD HICKEN,
Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

The City of Montgomery, Alabama, its Mayor, and its former Chief of Police, petition for a writ of certiorari to review the judgment of the United States Court of Appeals for the Eleventh Circuit in this case.

OPINIONS BELOW

The opinion of the court of appeals is reported at 785 F.2d 959. It is reprinted as Appendix A to this petition. The opinion of the district court is not reported. It is reprinted as Appendix B to this petition.

JURISDICTION

The judgment of the court of appeals was entered on April 2, 1986. On June 23, 1986, Justice Powell extended the time for filing a petition for certiorari to and includ-

ing July 31, 1986. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

STATEMENT

This case involves a Section 1983 action brought by respondents, former police officers in the City of Montgomery, challenging their dismissals from the police force on the ground that the dismissals violated their rights against self-incrimination. The district court upheld the dismissals, finding that respondents' invocation of the privilege directly interfered with the performance of their duty to testify about their investigations. The court of appeals reversed, stating that, "[u]nder the law, a public employee cannot be terminated for refusing to waive fifth amendment rights." Pet. App. 8a.

The history of this case falls into three parts: the "Todd Road incident," which respondents were assigned to investigate; the pre-trial hearing and trial of Worrie Taylor, a defendant charged in connection with the Todd Road incident, at which respondents refused to testify about their investigations; and the proceedings below.

a. *The Todd Road Incident.* The Todd Road incident was a subject of serious and longstanding controversy in Montgomery, Alabama. Pet. App. 2a. Although the details in the record are incomplete, the incident arose out of an investigation by the police in the area of Todd Road. In the course of that investigation, one officer was assaulted and a second officer was shot. Pet. App. 2a; 9a n.1. Ultimately, several persons (including Worrie Taylor) were indicted as a result of the incident. Pet. App. 2a.

The controversy emerged out of sharply differing versions of the events at Todd Road. Residents of the area charged that the police officers had used unnecessary force and suggested that this conduct was racially motivated. There were also complaints that the police had ad-

ministered beatings during questioning. The police denied the charges. Various investigations were then conducted into the charges. In addition, persons indicted in connection with the incident pursued the question of police misconduct as part of their defense. Pet. App. 2a.

Respondents, who had not been involved in the Todd Road incident, were assigned to investigate it.

b. *The Worrie Taylor Hearing and Trial.* Respondents were thereafter subpoenaed by defendants in the Todd Road case to testify about the results of their investigations. The first of these subpoenas sought their testimony at hearings on pre-trial motions made by several defendants, including Worrie Taylor.[1] Both respondents refused to answer a series of questions about their investigations, put to them by the defendants, citing the constitutional privilege against self-incrimination as the reason for doing so. Pet. App. 2a; 10a-11a.[2]

Upon learning of respondents' refusal to give testimony, petitioner Emory Folmar, the Mayor of Montgomery, sent them a letter telling them that they would be dismissed if they persisted in withholding information about their investigations. Pet. App. 11a.[3] He also called

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[1] Although both the district court and court of appeals referred to these hearings as "preliminary hearings," they were, in fact, hearings on motions to suppress evidence. Respondents had previously testified before a special grand jury investigating the incident.

[2] Respondent Benjamin declined to answer more than 40 questions about the results of his investigations, all on the grounds of the privilege against self-incrimination. Pl. Ex. 1, pp. 85-97. Respondent Hicken, citing the privilege in each case, declined to answer between 20 and 25 questions. *Id.*, pp. 100-116.

[3] Petitioner Folmar attached to the letter an affidavit, executed several months earlier, that specified: "No police officer or city employee who gives such information will in any way be fired, suspended, harrassed or intimidated directly or indirectly by me or any person under my authority or control for providing such information." Pl. Ex. 2.

respondents to his office. At that meeting, he told them to report to the District Attorney and to divulge all relevant information. Pet. App. 2a; 11a. Apparently believing that the threat of dismissal gave them immunity from any use of the information against them, respondents proceeded to the District Attorney's office. Pet. App. 2a; 11a. The District Attorney, concerned about receiving "compelled" testimony, declined to interview them. Pet. App. 2a; 11a.

Slightly more than seven weeks later, respondents were subpoenaed, again by the defense, to testify at Worrie Taylor's trial. Pet. App. 2a; 11a-12a. When respondent Hicken was called to the stand, he refused to answer approximately a dozen questions about his investigation on the ground of the privilege against self-incrimination. Pet. App. 2a; 12a. At that point, asked by the trial judge about his intentions regarding testimony, respondent Hicken said that he would answer questions only from the District Attorney. Pet. App. 2a; 12a. He informed the court that he would not answer any questions asked by the defense or by the court itself. Pl. Ex. 1, p. 623.

There followed a round of events that culminated in the dismissals. First, the court asked petitioner Folmar to take the stand, suggesting that the Mayor withdraw his letter threatening dismissal. Pet. App. 2a-3a.[4] Mayor Folmar withdrew the letter. Pet. App. 3a; 12a. Respondents were not recalled to testify, however, until two days later. At that time, seeking automatic immunity under *Garrity v. New Jersey*, 385 U.S. 493 (1967), they indicated that they would testify but only under coercion from the threat of termination. Pet. App. 3a; 12a. Mayor Folmar, stating that the refusal to testify voluntarily

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[4] The trial judge was under the impression that respondents might testify without coercion. As the later proceedings made clear, however, the element of coercion was actively sought by respondents in order to obtain immunity.

violated the terms of their jobs, then dismissed them. Pet. App. 3a; 12a-13a. Respondent Hicken was recalled to the stand and, once more, declined to answer questions. Pet. App. 3a; 13a.

c. *The Proceedings Below.* Respondents thereafter filed this Section 1983 action, alleging that their dismissals violated their rights against compulscry self-incrimination. Named as defendants were the City of Montgomery, Mayor Folmar, and Charles Swindall, the former Chief of Police.

The district court, after a bench trial, entered judgment for the defendants. The court undertook to balance respondents' conceded right to claim the privilege against self-incrimination against the interests of the City in dismissing police officers who were unwilling to testify voluntarily about their investigations. Pet. App. 14a-15a. The court concluded that the City had "good cause" to dismiss respondents based upon their "refusal . . . as investigating officers to testify to their investigative findings in a court of law." Pet. App. 15a. In reaching that conclusion, the court stated: "When an officer's conduct places him in a position where he cannot or will not do his duty as an officer, his usefulness as an officer and his right to be an officer terminate." Pet. App. 14a-15a.

The court of appeals reversed. The court held that three cases decided by this Court—*Garrity v. New Jersey; Gardner v. Broderick*, 392 U.S. 273 (1968); and *Uniformed Sanitation Men Assoc. v. Commissioner of Sanitation*, 392 U.S. 280 (1968)—established that "a governmental unit may not require public employees, even police officers, to waive their fifth amendment right against self-incrimination." Pet. App. 3a. Noting that Mayor Folmar had insisted that respondents' testimony be voluntary, the court held that the dismissals were thus based upon the "refusal to waive a constitutional right." Pet. App. 7a-8a. It remanded the case to the district court "for the determination of appropriate relief." Pet. App. 8a.

REASONS FOR GRANTING THE WRIT

This case presents an important question regarding the authority of governmental employers to dismiss employees for refusing to do their jobs. It is undisputed that respondents, police officers assigned to investigate an incident of great controversy in Montgomery, Alabama, were dismissed because they refused to testify voluntarily about their investigations. The district court, while recognizing "a public officer's right not to be a witness against himself," Pet. App. 14a, upheld the dismissals, concluding that "[t]he State's right and duty to assure to its best ability that the public will have full access to the investigations of peace officers must prevail over the rights of the peace officers." Pet. App. 14a. The court reasoned that, "[w]hen an officer's conduct places him in a position where he cannot or will not do his duty as an officer, his usefulness as an officer and his right to be an officer terminate." Pet. App. 14a-15a.

The court of appeals thought otherwise. Without considering the importance to the City of having its officers testify openly and unconditionally about their investigations, the court held that the officers were free both to withhold their testimony and to continue in their jobs unless they were given either express or implied immunity. The court found this result to be compelled by the decision in *Garrity v. New Jersey*, 385 U.S. 493 (1967), as well as the later cases of *Gardner v. Broderick*, 392 U.S. 273 (1968), and *Uniformed Sanitation Men Association v. Commissioner of Sanitation*, 392 U.S. 280 (1968) (*Sanitation Men*). According to its view, these cases established the flat rule that public employees "cannot be terminated for refusing to waive fifth amendment rights." Pet. App. 8a.

The court of appeals' decision warrants review for several reasons. First, the court of appeals simply misread the cases of this Court on which it relied. No decision of

this Court—in particular, not *Garrity* or any of the cases in its wake—has ever held that the claim of a constitutional right permits an employee to disregard a legitimate and essential part of his job. On the contrary, this Court has made clear that the interests of an individual employee must give way when they "interfere with the discharge of his public duties." *Branti v. Finkel*, 445 U.S. 507, 517 (1980). Second, the court of appeals ignored numerous cases from this Court specifying the need to weigh legitimate governmental interests against the individual interests of the employee. It thus failed utterly in its obligation to give "full consideration [to] the government's interest in the effective and efficient fulfillment of its responsibilities to the public." *Connick v. Myers*, 461 U.S. 138, 150 (1983).

1. The Decisions of this Court Do Not Prohibit a Government From Dismissing an Employee for Refusing to Perform a Necessary Part of His Job.

a. The court of appeals rested its holding almost entirely on its view of three cases decided by this Court: *Garrity v. New Jersey*, *Gardner v. Broderick*, and *Sanitation Men*. In its view, those cases stood for the proposition "that a governmental unit may not require public employees, even police officers, to waive their fifth amendment right against self-incrimination." Pet. App. 3a. We think that this reading of *Garrity* and its progeny is far too broad.[5]

To begin with, the statement of the issue in terms of "require[d] waiver" inevitably leads the court off in the wrong direction. As we discuss more fully below, see pages 17-21 *infra*, this Court in recent years has largely abandoned the absolute principles that used to govern

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[5] The descendants of *Garrity* include the later cases of *Lefkowitz v. Turley*, 414 U.S. 70 (1973), and *Lefkowitz v. Cunningham*, 431 U.S. 801 (1977), both of which involved terminations based on exercise of the privilege against self-incrimination. These cases, which were not mentioned by the court of appeals, are discussed at pages 10-12 *infra*.

conflicts between constitutional rights and public employment. Thus, on the one hand, an employer can no longer defend its conduct on the basis that "a public employee ha[s] no right to object to conditions placed upon the terms of employment—including those which restricted the exercise of constitutional rights." *Connick v. Myers*, *supra*, 461 U.S. at 143. On the other hand, an employee cannot maintain that a governmental employer may never "condition [constitutional rights] by the exaction of a price." *Garrity v. New Jersey*, *supra*, 385 U.S. at 500. Public employees are frequently, and lawfully, put to the choice between the fullest enjoyment of a constitutional right and a position of public service. See, e.g., *CSC v. Letter Carriers*, 413 U.S. 548 (1973); *Broadrick v. Oklahoma*, 413 U.S. 601 (1973); *Kelley v. Johnson*, 425 U.S. 238 (1976).[6]

The dismissals in this case thus cannot be deemed invalid merely by characterizing them as involving the waiver of a constitutional right. By that standard, for example, it could easily be said that the federal government forced its employees to "waive" their First Amendment rights to engage in overt political activity (*CSC v. Letter Carriers*) or that Suffolk County, New York forced its police officers to "waive" their rights to control their personal appearance (*Kelley v. Johnson*). Yet, this Court upheld both of those involuntary "waivers" on the ground that full exercise of those rights by the employees would have interfered with the performance of their jobs.[7] In this case, the City did not dismiss respond-

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[6] The Court has thus held that the constitutional rights of public employees can be restricted if their exercise would disrupt the carrying out of the employees' public duties. *See* pages 17-19 *infra*.

[7] The Court noted in *CSC v. Letter Carriers* that "it is not only important that the Government and its employees in fact avoid practicing political justice, but it is critical that they appear to the public to be avoiding it, if confidence in the system of representative Government is not to be eroded to a disastrous extent." 413 U.S. at 565. In *Kelley v. Johnson*, the Court said that the "[c]hoice of

ents because they refused to waive a right as such, but because their reliance on the right prevented them from doing their job as police officers.[8]

The distinction is more than just a semantic one. In our view, a City is entitled to dismiss police officers for refusing to do their jobs *even though* the reason for the refusal happens to be the privilege against self-incrimination. It may not, however, dismiss the officers for their refusal *because* the reason is the privilege. Although this line may not always be a bright one, it marks the boundary between impermissible efforts to penalize directly the exercise of a constitutional right and permissible efforts to set employment standards without discriminating against employees asserting constitutional rights. Thus, for example, a public employer could dismiss workers for their unexcused absences during working hours, despite a claim that they were attending political rallies, but could not single out only absentees attending such rallies for dismissal. See, e.g., *Grossart v. Dinaso*, 758 F.2d 1221, 1236 (7th Cir. 1985) (Posner, J., dissenting) (public employer "could fire [employee] for being uncooperative even if her uncooperativeness was politically motivated; but he could not fire her for uncooperativeness *because* it was politically motivated) (emphasis in original).[9]

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organization, dress, and equipment for law enforcement personnel is a decision entitled to the same sort of presumption of legislative validity as are state choices designed to promote other aims within the cognizance of the State's police power." 425 U.S. at 247.

[8] As we discuss below, see pages 14-17 *infra*, there is a clear evidentiary difference between testimony given voluntarily as part of an officer's usual duties and testimony given, by the officer's own admission, only as the result of "coercion." Because the City had the right to expect voluntary testimony about respondents' investigations, a grant of immunity would not have allowed respondents to preserve their rights and still meet the legitimate expectations of the City as their employer.

[9] In *Grossart*, the court of appeals upheld the dismissal of an employee, in spite of claims that it was based on her political

The proper inquiry here, therefore, is not whether the City forced respondents to "waive" their rights, but whether the privilege against self-incrimination excuses respondents from performing a necessary part of their jobs. The cases cited by the court of appeals simply do not answer that question. All of the cases involving dismissals—*Gardner v. Broderick*, *supra*, *Sanitation Men*, *supra*, as well as the uncited cases of *Lefkowitz v. Turley*, 414 U.S. 70 (1973), and *Lefkowitz v. Cunningham*, 431 U.S. 801 (1977)—involved very different situations: refusals to answer questions put to the employees or contractors, not as an integral part of their jobs, but as part of investigations into their own criminal conduct. See 392 U.S. at 274; 392 U.S. at 281; 414 U.S. at 75-76; 431 U.S. at 803. Moreover, and of equal importance here, the resulting dismissals came about as the result of statutes expressly requiring the termination of public employees invoking the privilege. See 392 U.S. at 275-76 & n.3; 392 U.S. at 281-82 & n.3; 414 U.S. at 71 & n.1; 431 U.S. at 802-03 & n.1. See *United States v. Indorato*, 628 F.2d 711 (1st Cir. 1980) (all cases flowing from *Garrity* involve statute or ordinance mandating dismissal for invoking the right).[10]

Although the court of appeals paid no attention to these differences, they have a marked effect on the rights and

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beliefs, saying that it was "[her] job to retain [her supervisor's] confidence in her ability to implement his policies despite her personal political beliefs." 758 F.2d at 1233.

[10] The statute at issue in *Lefkowitz v. Cunningham*, for example, specified that "[i]f any party officer, after lawful notice of process, willfully refuse or fail to appear before any court or judge, grand jury, legislative committee, officer, board or body authorized to conduct any hearing or inquiry concerning the conduct of his party office or the performance of his duties, or having appeared, shall refuse to testify or answer any relevant question, or shall refuse to sign a waiver of immunity against subsequent criminal prosecution, his term or tenure of office shall terminate, such office shall be vacant and he shall be disqualified from holding any party or public office for a period of five years." 431 U.S. at 802 n.1.

interests involved. The fact that the dismissals followed automatically from the raising of the privilege, by operation of statutes aimed at that very act, shows that the governments involved were employing one of two conclusive presumptions: either that an employee invoking the privilege was, by that reason alone, unfit for public service or that an employee invoking the privilege was necessarily guilty of the criminal offense under scrutiny and, on that ground, unfit for public service. As this Court had made clear in cases leading up to *Garrity*, however, neither of these presumptions is constitutionally permissible.

With regard to the first presumption, it is hard to imagine a more direct attack upon a constitutional right than a statute requiring automatic dismissal for raising it. The legislative mandate to terminate any employee invoking the privilege, regardless of the questions asked or the effect of the refusal to answer, singled out a group of employees for harsh treatment precisely because they decided to exercise a constitutional right. Notably, there was no indication in any of the cases cited by the court of appeals that the refusal to answer questions, in and of itself, made it impossible, or even more difficult, for the employees to perform their jobs.[11] Indeed, virtually all of the dismissals occurred before any questions were even asked, based on the unwillingness of the employees or contractors to sign a blanket waiver of Fifth Amendment rights. The cases thus fell within the proposition, set out by this Court in *Wieman v. Updegraff*, 344 U.S. 183 (1952), that "constitutional protection does extend to the public servant whose exclusion pursuant to a statute is patently arbitrary or discriminatory." *Id.* at 192.

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[11] In reviewing the statutes at issue in *Garrity* and later cases, the Eighth Circuit observed: "These rules were formulated specifically to compel persons to waive their constitutional rights and imposed severe sanctions directly in response to the exercise of the constitutional right." *NLRB v. Alexander*, 595 F.2d 454, 458 (1979).

It is no more appropriate to treat the "failure to respond to interrogation . . . as a final admission of guilt." *Baxter v. Palmigiano*, 425 U.S. 308, 318 (1976). Well before *Garrity* was decided, this Court had "condemn[ed] the practice of imputing a sinister meaning to the exercise of a person's constitutional right under the Fifth Amendment." *Slochower v. Board of Education*, 350 U.S. 551, 557 (1956). Noting that it had previously "scored the assumption that those who claim this privilege are either criminals or perjurers," the Court observed: "The privilege against self-incrimination would be reduced to a hollow mockery if its exercise could be taken as equivalent either to a confession of guilt or a conclusive presumption of perjury." *Id.* It was fundamentally at odds with this principle for the cities and states in *Gardner* and later cases to assume that the employees' silence demonstrated their involvement in criminal activity and, hence, their unsuitability for public service. See also *Konigsberg v. State Bar of California*, 353 U.S. 252 (1957) (invalidating rejection of bar applicant for his refusal to answer questions about political affiliation).

These sorts of presumptions are simply not operative here. First of all, no City ordinance requires dismissal of public employees solely for invocation of the privilege. Thus, there has been no attempt by Montgomery to turn the exercise of constitutional rights into grounds for termination *per se*. Furthermore, the City has not tried to impute to respondents any presumption of criminal conduct as a basis for their dismissals. Respondents were not dismissed as suspected "criminals or perjurers," but as employees who were unable to perform their assigned duties.[12]

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[12] The district court, in determining that the City had "good cause for the discharges," specifically found that respondents were dismissed for their "refusal . . . as investigating officers to testify to their investigative findings in a court of law." Pet. App. 15a.

What the court of appeals failed to recognize is that some governmental jobs, by their very nature, require that their occupants speak (or not speak) in certain ways. Thus, although this Court has largely prohibited governmental units from making political orthodoxy a condition of employment, it would be nonsensical to prohibit dismissal of a public school teacher because he refused on ideological grounds to teach the assigned curriculum. It would be equally strange if the contractors in *Lefkowitz v. Turley* could have refused to submit accounting records or required work reports on Fifth Amendment grounds and, at the same time, insisted upon payment for their work. In those cases, as here, the employees simply would not have met necessary requirements of the job that they were hired to do.[13]

By treating this case as one with *Gardner* and *Sanitation Men*, therefore, the court of appeals gave new, and unfounded, scope to the privilege against self-incrimination. While this Court has held that a government may not automatically condition public employment upon the surrender of the privilege, it has never held that the privilege, or any other constitutional right for that matter, permits an employee to have his job and yet not do it. Nor do we think that such an expansion is appropriate. As the Court has stated in a similar context, the constitutional rights of an employee "may be required to yield to the State's vital interest in maintaining governmental effectiveness and efficiency." *Branti v. Finkel, supra*, 445 U.S. at 517.

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[13] This does not mean that employers could engraft whatever conditions they liked on public service, regardless of the need for them or the impact on individual rights. As is true in any case, the basis for the requirement must be weighed against its effects. See pages 17-21 *infra*. In this case, however, it could not seriously be argued that a policy requiring police officers to testify voluntarily about their investigations is without reasonable basis.

b. The decision of the court of appeals, relying on the same group of cases, also seems to suggest that the City had to give respondents immunity to spare them the choice between voluntary testimony and dismissal.[14] The suggestion, once again, draws more from the cases than they contain.

It is true that immunity, either express or implied, would have allowed the City to force respondents to testify.[15] But it does not follow that the giving of immunized testimony would have satisfied the interests of the City as an employer. As is the case with any witness, the weight given to the testimony of public employees depends in great degree on the conditions under which they testify. Here, although all City police officers are expected to testify openly in court about matters that they have investigated, respondents instead insisted upon the right to present their testimony as involuntary and coerced. By any practical measure, the impact of testimony given under those conditions will be different from that of testimony routinely given in the course of employment. That difference in impact, in turn, may well affect whether a defendant is convicted or acquitted at trial.

It should be self-evident that, whether they are called on its behalf or by other parties, a City has a strong

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[14] The court of appeals concluded that respondents were not dismissed for failure to answer questions narrowly tailored to their duties. Pet. App. 1a-2a. Since no one disputes that the questions put to the respondents on the witness stand involved their investigations and nothing more, the court of appeals' conclusion can only mean that the City had to extend immunity before the questions were asked.

[15] The question here, of course, is not whether particular statements given by respondents may be used in criminal proceedings against them. By virtue of their claim of privilege, respondents did not ever have to testify against their will. Cf. *Minnesota v. Murphy*, 104 S. Ct. 1136 (1984) (finding waiver in failure to raise privilege).

interest in the nature of the testimony given by its police officers. That interest goes well beyond the content of the testimony itself. The credibility of the officers—a credibility that is necessarily affected by the terms on which they agree to appear—is also of vital concern, both to the administration of justice and to public confidence in the judicial process. It can hardly have been reassuring for the citizens of Montgomery to learn, first, that the officers investigating the Todd Road incident had refused to testify about their investigations and, later, that they would testify about the investigations only if coerced. Having hired respondents to testify voluntarily, the City should not have to accept coerced testimony in its stead.

The circumstances in *Gardner*, *Sanitation Men*, and the two *Lefkowitz* cases were again very different. As the Court took some pains to suggest, the governments in those cases could have completely protected their interests as employers (as contrasted to their interests as prosecutors) by getting involuntary answers under cloak of immunity. If the employees revealed their own wrongdoing in response to the questions, then the employer could dismiss them; if they demonstrated their innocence, then the employer had no need to dismiss them. For these purposes, it made no difference whether the answers were given voluntarily or not since it was the content of the answers, not the circumstances under which they were given, that mattered. Thus, the only conceivable interest in having the answers pursuant to an express waiver of immunity was to preserve them for use in the ongoing criminal proceedings against the employees—the very proceedings, of course, that gave rise to the questions in the first place. See *Ryan v. Montana*, 580 F.2d 998 (9th Cir. 1978) (purpose of statute in *Lefkowitz v. Cunningham* "to force . . . self-incriminating statements").

We do not doubt that respondents here would have preferred to avoid the choice between voluntary testimony and the loss of their jobs. But, as has often been recognized, a person claiming the privilege cannot always have

the benefits both of silence and of the speech that he might otherwise like to give. In *Selective Service System v. Minnesota Public Interest Research Group*, 104 S. Ct. 3348 (1984), for example, this Court rejected a Fifth Amendment challenge to a federal requirement that students seeking financial aid have registered for the draft. Although the failure to register is a criminal offense, *id.* at 3358, the Court pointed out that "a person who has not registered is clearly under no compulsion to seek financial aid; if he has not registered, he is simply ineligible for aid." *Id.* See also *Alcaraz v. Block*, 746 F.2d 593 (9th Cir. 1984). The Court has also held that "the Fifth Amendment does not forbid adverse inferences against parties to civil actions when they refuse to testify in response to probative evidence offered against them." *Baxter v. Palmigiano, supra*, 425 U.S. at 318. Numerous courts of appeals have taken the same position in the face of arguments that silence, "forced" by the threat or actual pendency of criminal proceedings, prevented litigants from defending themselves in non-criminal matters. See, e.g., *Adams v. Dept. of Transportation, FAA*, 735 F.2d 488 (Fed. Cir. 1984); *Brinks, Inc. v. City of New York*, 717 F.2d 700 (2d Cir. 1983); *Book v. United States Postal Service*, 675 F.2d 158 (8th Cir. 1982); *Suzuki v. Yuen*, 617 F.2d 173 (9th Cir. 1980). Frequently, therefore, persons are put to difficult choices between speaking and claiming the privilege against self-incrimination.

These choices, like the choice required in this case, could be made unnecessary by a blanket rule prohibiting any adverse consequences unless immunity was extended. Quite apart from the practical consequences,[16] however, such a

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[16] Because the prosecution bears the burden of showing that particular evidence did not result from the use of coerced testimony, *Kastigar v. United States*, 406 U.S. 441 (1972), a grant of immunity may lead to increasing evidentiary disputes. The likelihood is even greater when the immunity arises solely by operation of law because of statements by an employer about possible dismissal. In such circumstances, the employer may not even be aware of any criminal investigation into the same matters.

rule would be needlessly broad. While the government may not fashion a system specifically to penalize exercise of the privilege, or seek out evidence for prosecution, in the guise of serving its interests as an employer, it can, as here, require persons claiming the privilege to choose silence over some other course where good reasons to do so exist. "The fact that such a choice may be difficult is not a reason for saying that the [government] has no power to require [the officials] to make it." *Lefkowitz v. Cunningham*, *supra*, 431 U.S. at 814 (Stevens, J., dissenting).

The effect of the decision below, therefore, is to force upon the City two police officers who indisputably would not do what they were hired to do. This outcome seems, in and of itself, to be illogical. But it is even more disturbing when the reason for the result is that the City should have allowed them to do the job in a different and less effective way or relieved them from the obligation to do it at all. That sort of judicial interference should not be allowed to stand.

2. The Proper Test for Assessing Claims Under the Fifth Amendment Requires An Inquiry Into Whether Assertion of the Privilege Will Significantly Interfere With Discharge of Public Duties.

The court of appeals gave no weight to the City's interest in having respondents' voluntary testimony because it devoted its complete attention to whether respondents had been coerced. This one-sided approach to Fifth Amendment claims is inconsistent with the more searching review given to claims by public employees under other constitutional provisions.

Beginning with a series of early cases, holding that public employees more or less took their jobs as they came, this Court has had no shortage of occasions to address the limits that governmental employers can impose on employees' rights. As we noted earlier, see page 8 *supra*,

recent cases have greatly expanded the protections given to public employees. But, even as they have done so, they have made clear that a public employee is not entitled to assert precisely the same rights as citizens at large. It is well-established that "the government has an interest in regulating the conduct and 'the speech of its employees that differ[s] significantly from those it possesses in connection with the regulation of the speech of the citizenry in general.'" *CSC v. Letter Carriers, supra,* 413 U.S. at 564; *Pickering v. Board of Education,* 391 U.S. 563, 568 (1968).

The distinction between governmental power over its own employees and that over the general public rests upon solid grounds. Unlike the situation in which a government reaches out to regulate the behavior of private citizens, its role as an employer leaves it no choice but to establish the terms and conditions under which its employees will work. Given that a government can act only through its employees, it must have the flexibility to assure that public policies are carried out despite individual inconvenience or personal disagreements. As the Seventh Circuit has observed, "[a] democracy cannot function if governmental employees are allowed to veto policies they disagree with by failing to be zealous and loyal." *Grossart v. Dinaso, supra,* 758 F.2d at 1233.

This interest in having a workable system of government has typically been given great weight in cases involving employees' rights. Only a few Terms ago, in a case involving claims by an employee under the First Amendment, this Court emphasized "the government's legitimate purpose in 'promot[ing] efficiency and integrity in the discharge of official duties, and to mainta[in] [ing] proper discipline in the public service.'" *Connick v. Myers, supra,* 461 U.S. at 150-51, quoting *Ex Parte Curtis,* 106 U.S. 371, 373 (1882). The Court then went on to quote with approval from the separate opinion of Justice Powell in *Arnett v. Kennedy,* 416 U.S. 134, 168

(1974), observing: "To this end, the Government, as an employer, must have wide discretion and control over the management of its personnel and internal affairs. This includes the prerogative to remove employees whose conduct hinders efficient operation and to do so with dispatch." *Id.* See also *Branti v. Finkel*, *supra*, 445 U.S. at 517; *Vicksburg Firefighters Ass'n v. City of Vicksburg*, 761 F.2d 1036, 1039 (5th Cir. 1985) ("[t]he problem is to balance the rights of the employees as citizens against the interests of the state in promoting efficient public service") (internal quotes omitted); *Wilton v. Mayor and City Council of Baltimore*, 772 F.2d 88 (4th Cir. 1985); *Bowman v. Pulaski County Special School District*, 723 F.2d 640 (8th Cir. 1983).

So far as the court of appeals in this case was concerned, this interest in effective government might just as well not exist. As any fair reading of its opinion reveals, the court was concerned exclusively with the free exercise of the right itself—in particular, whether the possible loss of employment could be regarded as coercion. The court paid no attention to the effect on the City of retaining police officers who draw the line at giving voluntary testimony. Nor did it consider the harm to the City of having coerced testimony as a substitute for testimony in the normal course of duty. In striking its balance, therefore, the court of appeals put all of the weight on a single side of the scale.

We see no reason for this disregard of the City's interests. In particular, we find nothing in the Fifth Amendment that would justify a departure from the approach taken to claims under other constitutional provisions. While Fifth Amendment rights are obviously of great importance, it can hardly be said that they stand on a different level altogether. Indeed, this Court has upheld restrictions on the political activity of public employees, see *CSC v. Letter Carriers*, *supra*, and *Broadrick v. Oklahoma*, *supra*, despite its recognition that "speech

on public issues occupies the highest rung of the hierarchy of First Amendment values." *Connick v. Myers, supra,* 461 U.S. at 145 (internal quotes omitted). And, where the exercise of the privilege directly interferes with the giving of evidence about criminal investigations, the governmental interest is every bit as important as the interest in regulating the political activity of employees whose unrestricted activities would interfere with public confidence.

The proper approach to this case, therefore, seems to us far more like that taken by the district court than that followed by the court of appeals. Rather than deciding that respondents' refusal to testify without immunity was absolutely protected, the district court weighed that right against the City's interest in having its police officers testify voluntarily about their investigations. Had the court of appeals done so, it should, like the district court, have come to two entirely reasonable conclusions: first, that the conduct of the officers did "interfere with the discharge of [their] public duties," and, second, that the City's interest in proper discharge of those duties was substantial. At that point, as the district court found, it was appropriate to conclude that the rights of respondents must yield to the legitimate interests of the government as a whole.

The failure of the court of appeals to give "full consideration [to] the government's interest in the effective and efficient fulfillment of its responsibilities to the public," *Connick v. Myers, supra,* 461 U.S. at 150, is even more noteworthy because the officials involved are policemen. It is not necessary to assign policemen a "watered-down version of constitutional rights," *Garrity v. New Jersey, supra,* 385 U.S. at 500, to acknowledge the importance of their duties to maintaining public order and confidence. The Eighth Circuit, noting that the assumption of public employment may "require the surrender of rights that would otherwise be beyond the reach of gov-

ernmental power," has said: "This is especially true in the case of the police, whose duty it is to keep the peace by force of arms if necessary." *Reeder v. Kansas City Board of Police Commissioners*, 733 F.2d 543, 547 (1984).

It is not surprising, therefore, that this Court and the lower federal courts have upheld a wide variety of conditions imposed by local governments on their police officers. In *Kelley v. Johnson, supra*, this Court rejected a challenge by a policeman to certain hair-length regulations, pointing out that his claim to protection under the Fourteenth Amendment was made "not as a member of the citizenry at large, but on the contrary as an employee of the police department of Suffolk County . . . ." *Id.* at 244-45. In upholding the regulations, the Court noted that the County had, "in accordance with its well-established duty to keep the peace, placed myriad demands upon the members of the police force, duties which have no counterpart with respect to the public at large." *Id.* at 245. Lower federal courts have upheld, among other things, restrictions on running for office (*Otten v. Schicker*, 655 F. 2d 142 (8th Cir. 1981)); requirements of financial disclosure (*O'Brien v. DiGrazia*, 544 F.2d 543 (1st Cir. 1976), *cert. denied*, 431 U.S. 914 (1977); discipline for cohabiting with another police officer (*Shawgo v. Spradlin*, 701 F.2d 470 (5th Cir.), *cert. denied sub nom. Whisenhunt v. Spradlin*, 104 S. Ct. 404 (1983); and discipline for continuing a personal relationship with a gangster's wife (*Baron v. Maloni*, 602 F. Supp. 614 (W.D.N.Y. 1985)). And they have done so in the face of arguments based upon rights to speech, political association, personal liberty, privacy, and, in the case of the compelled financial disclosures, the privilege against self-incrimination. It is entirely consistent with those cases to suggest that the interest in an effective police force outweighs the right of individual officers to withhold testimony about their investigations.

As the number of cases before this Court has indicated, there is no magic formula for striking a balance between the rights of public employees and the interests of governmental employers.[17] The lack of an easy standard, of course, makes it all the more difficult for the employers themselves, who not only must try to achieve a balance in the first instance but must often do so in conditions of turmoil. At the very least, those employers should be entitled to the confidence that judicial review of their decisions will not vary arbitrarily depending upon whether the case arises under one constitutional provision or another, or whether the reviewing court does or does not address the governmental interests at stake. By any reasonable standard, when the rights asserted by an employee keep him from performing a legitimate part of his job, those rights must give way to the interests of the public in the proper operation of its government.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

H. BARTOW FARR, III
ONEK, KLEIN & FARR
2550 M Street, N.W.
Suite 350
Washington, D.C. 20037
(202) 775-0184

N. GUNTER GUY, JR.
City Attorney
City Hall
Montgomery, AL 36104

GEORGE B. AZAR
AZAR, CAMPBELL & AZAR
260 Washington Avenue
Montgomery, AL 36197
Counsel for Petitioners

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[17] The Court will hear argument this Term in a case involving the Fourth Amendment rights of public employees. See *Ortega v. O'Connor*, 764 F.2d 703 (9th Cir. 1985), *cert. granted*, No. 85-530.

APPENDICES

APPENDIX A

UNITED STATES COURT OF APPEALS
ELEVENTH CIRCUIT

No. 85-7135

LONNIE BENJAMIN and HAROLD HICKEN,
Plaintiffs-Appellants,

v.

THE CITY OF MONTGOMERY, *et al.*,
Defendants-Appellees.

April 2, 1986

Appeal from the United States District Court
for the Middle District of Alabama

Before KRAVITCH and HATCHETT, Circuit Judges, and MORGAN, Senior Circuit Judge.

KRAVITCH, Circuit Judge:

This appeal presents the question of whether two police officers were dismissed for a proper invocation of their fifth amendment rights against self-incrimination or for improperly refusing to answer questions narrowly tailored and specifically directed to the performance of their duties.

Lonnie Benjamin and Harold Hicken, both veteran officers of the Montgomery, Alabama Police Department, filed a section 1983 action challenging their dismissal from the force. After a bench trial, the district court entered judgment for the defendants. Under the unusual facts of this case, we hold that the dismissals of the officers violated their fifth amendment rights.

The facts as developed at trial and set forth in the district court's order are basically undisputed. The dismissal grew out of the "Todd Road incident," which apparently caused some stir in Montgomery. The incident involved an assault upon two Montgomery police officers, in which one officer was shot. Several persons were indicted in connection with the incident. The defendants in those cases, seeking to show police misconduct during the incident and the subsequent investigation, sought the testimony of officers Benjamin and Hicken concerning their investigation of the incident.

On October 6, 1983, defendants in the Todd Road case subpoenaed Benjamin and Hicken to testify at preliminary hearings in the circuit court of Montgomery County. Both officers refused to answer questions about their investigation of the incident, citing their right against self-incrimination. The next day, the Mayor of Montgomery, Emory Folmar, ordered the officers to report to the District Attorney and divulge all information relevant to the case. The District Attorney, however, declined to interview the officers, citing the fact that the officers would obtain immunity against use of the statements. The plaintiffs then were placed on administrative leave with pay.

On November 21, the appellants were subpoenaed to testify at the trial of Worrie Taylor, one of the Todd Road defendants. Hicken took the stand and again refused to answer questions about the investigation of the incident. He indicated he would only answer questions from the District Attorney. The trial court judge then called

Mayor Folmar to the stand. While on the stand, Mayor Folmar withdrew his order of October 7. He stated that:

> If this Honorable Court calls Sergeant Benjamin or Sergeant Hicken to this stand and they do not tell everything they know about this case to the best of their ability and the full truth, I will fire them right this minute.

The appellants were not recalled that day.

On November 23, the appellants were recalled to the stand. Upon inquiry by the court, both indicated a willingness to testify, but only because the Mayor had ordered them to testify. For some reason, the court refused to accept their testimony. The court then recalled Mayor Folmar to the stand, and suggested that the Mayor fire the officers, apparently under the misconception that they would then testify. The court called a recess, during which Mayor Folmar informed the appellants that their employment was terminated. The appellants were then recalled to the stand, and again they refused to answer questions.

In ruling on the officers' section 1983 action, the federal district court held that the state's right to obtain testimony from police officers outweighed the officers' fifth amendment rights. As discussed below, the district court's ruling is contrary to established Supreme Court precedent that a governmental unit may not require public employees, even police officers, to waive their fifth amendment right against self-incrimination.

The watershed case in the area is *Garrity v. New Jersey*, 385 U.S. 493, 87 S.Ct. 616, 17 L.Ed.2d 562 (1967). In *Garrity*, former police officers were convicted of obstruction of justice in connection with the fixing of traffic tickets. The officers had been questioned about the charges by the attorney general. They were warned that their answers might be used against them, and that they could refuse to answer, but that if they did so they would be

dismissed. 385 U.S. at 495, 87 S.Ct. at 617. The officers answered; over their objection, the answers they gave were used against them in criminal prosecutions. The Supreme Court held that the statements had been coerced from the officers by the threat of dismissal, and therefore reversed the convictions. In *Gardner v. Broderick*, 392 U.S. 273, 88 S.Ct. 1913, 20 L.Ed.2d 1082 (1968), a police officer was called before a grand jury investigating police corruption. He was advised of his right against self-incrimination, but told that if he refused to sign a waiver of immunity, he would be dismissed pursuant to a state law which required dismissal of any public employee who invoked the fifth amendment in connection with an investigation of the employee's official duties. He refused to sign, and was discharged for so refusing. The Supreme Court held that the officer "was discharged from office, not for failure to answer relevant questions about his official duties, but for refusal to waive a constitutional right." 392 U.S. at 278, 88 S.Ct. at 1916. Accordingly, the officer was entitled to reinstatement. In a companion case, *Uniformed Sanitation Men Assoc. v. Commissioner of Sanitation*, 392 U.S. 280, 88 S.Ct. 1917, 20 L.Ed.2d 1089 (1968), the Court stated:

> . . . if New York had demanded that petitioners answer questions specifically, directly, and narrowly relating to the performance of their official duties on pain of dismissal from public employment without requiring relinquishment of the benefits of the constitutional privilege, and if they had refused to do so, this case would be entirely different.

392 U.S. at 284, 88 S.Ct. at 1920.

This Circuit recently decided two cases which raised questions concerning the meaning of the line of Supreme Court cases discussed above. *See Hester v. City of Milledgeville*, 777 F.2d 1492 (11th Cir. 1985); *Erwin v. Price*, 778 F.2d 668 (11th Cir. 1985). Both cases turned on whether the public employee involved had been re-

quired to waive fifth amendment protection. The *Erwin* case involved dismissal of a police officer. During an internal police department investigation, Erwin refused to answer questions about an off-duty incident in which he allegedly brandished his gun in an improper manner. The internal investigator repeatedly assured the officer that his responses would not be used in any criminal proceedings. Moreover, the officer was aware of standing department orders

> which in substance state that police officers must answer questions narrowly related to their official duties, that answers will not be used in any subsequent criminal investigation and that refusal to testify will be considered insubordination subject to discipline including dismissal.

Id. at 669.

Erwin contended that because he was not afforded a statutory grant of immunity before being required to answer, he had been required to either waive his fifth amendment protection or lose his position. The panel, however, held that a public employee in Erwin's position would automatically obtain *Garrity*-type immunity; thus no grant of statutory use immunity was necessary. The panel explained

> that where there is a formal disciplinary investigation during which a public employee is ordered to answer proper questions under threat of dismissal, coercion is presumed and the government bears the burden of demonstrating voluntariness. "Therefore, 'any grant of use immunity to the plaintiff[] would have been duplicative.' "

Id. at 670 (quoting *Hester*, 777 F.2d at 1496).

The appellees contend that Officers Benjamin and Hicken were in the same position as the officer in *Erwin*. They argue that Benjamin and Hicken's testimony in the

trial of Taylor would have been compelled, that *Garrity*-type immunity would therefore have attached to the testimony, and accordingly the officers would not have waived their fifth amendment right against incrimination had they answered the questions. We disagree. The first time the officers were called, neither the mayor nor any police official had ordered them, upon pain of dismissal, to testify. Nor had they received any assurances that their testimony would not be used against them.

Appellees argue that police officers have a duty to testify in court, and that the City of Montgomery considers this to be a condition of their employment. The appellees attempted to establish this in the district court in their cross-examination of Benjamin and Hicken. Obviously, it is generally expected that police officers will testify in court. This general expectation, however, does not rise to the level of coercion. Appellees cited nothing in the Montgomery Police Department regulations which specifically requires officers to testify in court at the request of criminal defendants.[1] Indeed, the appellees' position is curious, for it would allow criminal defendants to provide police officers with use immunity whenever they called the officers as witnesses, thus transferring control of *Garrity*-type use immunity from police officials to counsel for criminal defendants. Moreover, appellees' position would allow criminal defendants to wield the tool of use immunity, normally denied to defendants. *See, e.g., United States v. Thevis*, 665 F.2d 616, 638-41 (5th Cir. Unit B), *cert. denied* 459 U.S. 825, 103 S.Ct. 57, 74 L.Ed.2d 61 (1982). In sum, at the time they first

[1] The appellees rely on two provisions in the department regulations. The provisions forbid officers from "engaging in any act that a reasonable person would view as an obstruction of justice," or interfering with the criminal justice system. Neither of these provisions come anywhere near the standards set forth in *Garrity* and *Erwin*. Accordingly, we need not consider whether a police officer could be coerced simply by the existence of police department regulations.

were called to the stand, appellants were not the subject of any disciplinary proceeding, and had not been directed to answer questions on pain of dismissal. Had they testified, their answers would not have been coerced, and could later have been used against them.

Even assuming that a court might find coercion in this situation, we cannot require public employees to speculate whether their statements will later be excluded under *Garrity*. *See Gardner v. Broderick*, 392 U.S. 273, 279, 88 S.Ct. 1913, 1916, 20 L.Ed.2d 1082 (1968) ("Petitioner could not have assumed—*and certainly he was not required to assume*—that he was being asked to do an idle act of no legal effect.") (emphasis added).

Once the Mayor ordered the officers to testify the situation changed. They were then under coercion to testify. They were recalled to the stand, and expressed a willingness to testify. They indicated to the court, however, that they were only willing to testify because of the coercion; in other words they were testifying on the condition that they receive *Garrity*-type immunity and thereby preserve their fifth amendment rights. For some reason, the state court refused to accept this testimony. The transcript of the state court proceeding clearly establishes that the Mayor discharged the appellants because they agreed to testify only under this condition. Moreover the Mayor's testimony in the federal district court confirms this:

> Q: If, in fact, Sergeants Benjamin and Hicken said that they were ready to testify, would you have fired them if you had known that fact?
>
> A: If they were ready to testify *openly and freely*, no, I would not.
>
> Q: Now, the question that was asked of you is, would you have fired them if you knew they were willing and ready to testify. And I believe your answer was that if they were willing to testify

truthfully and fully and freely you would not have fired them?

A: That is correct.

Q: Do you know if, in fact, they were ever willing to testify in that manner?

A: The information I received, that everything they said was qualified. That everything *they put a condition onto it* and that the district attorney refused to take their testify and *the judge refused to take their testimony on the conditions they attached to it.*

Q: And that was the condition that they attached . . . And you wanted them to testify without these conditions attached?

A: My thing was that they had a duty and responsibility, been paid by the public to do certain things according to the conditions of their employment. They were supposed to testify and tell what they knew about the case. They did not do that. That was the information the judge gave me, or he wouldn't have sent for me. And that is why I came and that is why I ultimately fired them

(Emphasis added). This testimony establishes that the appellants were terminated solely because they conditioned their testimony on retention of their fifth amendment rights: "not for failure to answer relevant questions about [their] official duties, but for refusal to waive a constitutional right." *Gardner v. Broderick*, 392 U.S. 273, 278, 88 S.Ct. 1913, 1916, 20 L.Ed.2d 1082 (1968). Under the law, a public employee cannot be terminated for refusing to waive fifth amendment rights. *Id.* Accordingly, the judgment of the district court is REVERSED and the case REMANDED for the determination of appropriate relief.

APPENDIX B

IN THE UNITED STATES DISTRICT COURT FOR
THE MIDDLE DISTRICT OF ALABAMA
NORTHERN DIVISION

Civil Action No. 84V-402-N

LONNIE BENJAMIN and HAROLD HICKEN,
Plaintiffs,

vs.

THE CITY OF MONTGOMERY,
A municipal corporation; *et al.*,
Defendants.

[Filed Jan. 22, 1985]

OPINION

On March 26, 1984, Plaintiffs filed their complaint under 42 U.S.C. § 1983 alleging a violation of constitutional rights as the result of a wrongful termination of employment as police officers by the City of Montgomery, through its Mayor, Emory Folmer, and Chief of Police, Charles Swindall. This termination occurred as the result of the Plaintiffs' investigation of the Todd Road incident,[1] and the Plaintiffs' refusal on the basis of their Fifth Amendment rights to divulge the information gathered as a result of the investigation.

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[1] The Todd Road incident involved the assault of two City of Montgomery police officers and the subsequent investigation of police misconduct in connection therewith. No testimony was offered exploring the events of the Todd Road incident. The Plaintiffs in this case had the responsibility of investigating the Todd Road incident and were not directly involved in that incident. It is difficult to understand how most of the questions asked could have involved any guilt of either investigator.

The initial question for determination in this case involves the right of police officers to invoke their Fifth Amendment rights against self-incrimination when said right directly interferes with the duty of police officers to testify as to matters discovered by them while investigating alleged or suspected crimes in their official line of duty.

Plaintiffs allege in their complaint that Defendant Folmar's termination of their employment was intended to punish Plaintiffs for exercising their right against self-incrimination which violates the rights guaranteed by the Fifth and Fourteenth Amendments to the United States Constitution.[2] The Plaintiffs assert that their discharge was arbitrary and capricious and was, therefore, a violation of the right to due process guaranteed by the Fourteenth Amendment of the United States Constitution;[3] that their rights to equal protection guaranteed by the Fourteenth Amendment were violated; and that their discharge was without cause and, therefore, constituted violations of ordinances of the State of Alabama, including violations of rules and regulations of the City of Montgomery.[4] No specific laws or regulations were pointed out to the Court.

On December 4, 1984, this Court held a nonjury trial in which oral testimony was offered on the question of the termination of the Plaintiffs' employment. The testimony taken at the trial revealed that Plaintiffs Benjamin and Hicken held the ranks of Sergeant in addition to being members of the City of Montgomery Police Department for 12 and 14 years, respectively. On October 6, 1983, Plaintiffs Benjamin and Hicken were subpoenaed to testify as witnesses in the preliminary hearings of the defendants involved in the Todd Road incident. When

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[2] Count I, ¶ 38, of Plaintiffs' complaint.

[3] Count II, ¶ 40, of Plaintiffs' complaint.

[4] Counts III and IV, ¶¶ 42 and 44, of Plaintiffs' complaint.

Plaintiffs were called to the stand to testify, each officer would answer a few introductory inquiries submitted by defense counsel. When specific questions were asked concerning their investigative findings regarding the Todd Road incident, each officer, upon advice of counsel, would invoke his constitutional privilege against self-incrimination.[5]

The following day, October 7, 1983, at 9:35 a.m., Plaintiffs Benjamin and Hicken received a letter [Plaintiffs' Exhibit 2 and Defendants' Exhibits 5 and 6] from Defendant Mayor Folmar directing the Plaintiffs to proceed immediately to the District Attorney's office and divulge all the information gathered in connection with the Todd Road incident. That same morning, Plaintiffs Benjamin and Hicken were summoned to Defendant Folmar's office, wherein the directive issued in the letter was reiterated by Defendant Folmar personally. Defendant Folmar warned Plaintiffs they would be fired if they failed to truthfully testify. Plaintiffs testified without contradiction that, upon leaving Defendant Folmar's office, the Plaintiffs proceeded immediately to the District Attorney's office prepared to reveal all the information in connection with the Todd Road incident. The District Attorney, apparently fearing a fatal error in his prosecution, declined to interview the Plaintiffs and deferred the interview to a later date.[6] At this stage, the Plaintiffs were placed on administrative leave with pay.

On November 21, 1983, Plaintiffs Hicken and Benjamin were subpoenaed to testify at the trial of Worrie Taylor,

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[5] Plaintiffs' Exhibit 1, R-84 through R-98, testimony of Lonnie Benjamin, and R-100 through R-103 and R-106 through R-108, R-112 through R-116, testimony of Harold Hicken.

[6] Although a later date was set, the District Attorney never interviewed the Plaintiffs nor examined the extent of their knowledge of the circumstances surrounding the Todd Road incident, indicating that any statement made by Plaintiffs would be involuntary [Plaintiffs' Exhibit 3].

one of the Todd Road defendants. Plaintiff Hicken took the stand and, upon being asked specific questions concerning circumstances surrounding the Todd Road incident and upon advice of counsel, invoked the constitutional privilege against self-incrimination.[7] Upon inquiry by the State Court, Plaintiff Hicken indicated the only person he would answer questions from was the District Attorney.[8] During the State Court proceedings, the Plaintiffs were never offered any form of immunity by the District Attorney. In an attempt to defuse a volatile situation, Circuit Judge Randall Thomas called in Defendant Folmar to testify. Defendant Folmar indicated that a letter had been sent ordering Plaintiffs Hicken and Benjamin to testify fully and truthfully. While on the stand, Defendant Folmar withdrew the letter [Plaintiffs' Exhibit 2] in an attempt to encourage the Plaintiffs to testify without invoking the right against self-incrimination. The Plaintiffs were not then recalled to the witness stand.

On November 23, 1983, Plaintiffs Benjamin and Hicken were recalled to testify and both indicated they were willing to testify concerning the Todd Road incident but only because of coercion due to Defendant Folmar's threat of termination.[9] Defendant Folmar then took the stand and indicated to Judge Thomas the Plaintiffs had been ordered by him to testify, and Defendant Folmar also indicated appropriate action would be taken to obtain the testimony.[10] Subsequent to this verbal colloquy, Judge Thomas called a recess to allow Defendant Folmar to confer with the Plaintiffs.[11] During this recess, Defendant Folmar called the Plaintiffs to a vacant witness room and asked

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[7] R-615 through R-618; R-620 through R-621.

[8] R-623.

[9] Plaintiffs' Exhibit 1, Lonnie Benjamin testimony, R-901 through R-904; Harold Hicken testimony, R-905.

[10] Plaintiffs' Exhibit 1, R-909.

[11] Plaintiffs' Exhibit 1, R-912.

the Plaintiffs if they had anything further to say. Counsel representing the Plaintiffs was present at this meeting and requested a court reporter. Defendant Folmar refused this request and once again asked the Plaintiffs if they had anything further to say. The Plaintiffs indicated they had nothing further to say, and Defendant Folmar immediately discharged Plaintiffs from employment as police officers of the City of Montgomery. Thereafter, Court was reconvened, and Defendant Folmar returned to the witness stand and informed Judge Thomas that Defendant Folmar had terminated the employment of the Plaintiffs.[12] Whereupon, Plaintiff Hicken was recalled to the witness stand and once again invoked his right against self-incrimination.[13]

Both Benjamin and Hicken insist that they were ready to testify on November 23, 1983, but, by this time, their testimony was of doubtful value to all concerned. Plaintiffs succeeded, before they were actually discharged, in painting themselves in a corner by initially refusing to testify and later by hedging on the Mayor's first order directing them to testify. Part of the colloquy in the State Court which shows clearly a refusal to testify by both Plaintiffs is the following:

> "THE COURT [to Benjamin]: * * * You would answer question from the defense or the Court * * *; is that correct? [R-902]
>
> "BENJAMIN: If I understand * * *, I would have answered questions to the District Attorneys." [R-902]
>
> "THE COURT: [Y]ou refused to testify in a Court of Law and you are a police officer, and part of your duties as a police officer are to testify, aren't they? [R-904]

---

[12] Plaintiffs' Exhibit 1, R-913.

[13] Plaintiffs' Exhibit 1, R-914 through R-915.

"BENJAMIN: Yes, sir." [R-904]

"THE COURT [to Hicken]: Are you still on the payroll at the Montgomery Police Department? [R-907]

"HICKEN: Yes, sir. [R-907]

"THE COURT: Although you have been refusing to testify since the first week of October? [R-907]

"HICKEN: * * * I have been going under advice of counsel. [R-907]

"THE COURT: * * * You have been refusing * * *? [R-907]

"HICKEN: Yes, sir." [R-907]

To allow peace officers to avoid discharge or other disciplinary proceedings for failure to give evidence in Court for such reasons would allow willing officers to abort all criminal proceedings where their investigative findings were the only substantial evidence of guilt or of innocence. It would subvert the public interests in fair trials to the possible willingness of corrupt officers to yield to threats, bribes and other inducements and forever protect the officer from any disciplinary procedure for failure to do his duty. It is this Court's duty to balance the reserved right of the State to insure fair trials [Amendment X of the U.S. Constitution] against a public officer's right not to be a witness against himself [Amendment V of the U.S. Constitution]. In such situations, the State's interests must prevail. An officer has the constitutional right not to give evidence against himself but he has no constitutional right to be an officer. The State's right and duty to assure to its best ability that the public will have full Court access to the investigations of peace officers must prevail over the rights of the peace officers. Access to such evidence is an element of due process of law, as well as of the State's police power. When an officer's conduct places him in a position where he cannot or will not do his

duty as an officer, his usefulness as an officer and his right to be an officer terminate.

This Court is of the opinion and finds that the discharge of both Plaintiffs was neither arbitrary nor capricious and that there was good cause for the discharges, that is, the refusal of the Plaintiffs as investigating officers to testify to their investigative findings in a court of law.

Judgment will enter for the Defendants with costs.

DONE this 22nd day of January, 1985.

/s/ [Illegible]
United States District Judge

APPENDIX C

UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

No. 85-7135

D.C. Docket No. 84-402

LONNIE BENJAMIN and HAROLD HICKEN,
Plaintiffs-Appellants,

versus

THE CITY OF MONTGOMERY, *et al.*,
Defendants-Appellees.

Appeal from the United States District Court for the
Middle District of Alabama

Before KRAVITCH and HATCHETT, Circuit Judges, and MORGAN, Senior Circuit Judge.

JUDGMENT

This cause came on to be heard on the transcript of the record from the United States District Court for the Middle District of Alabama, and was argued by counsel;

ON CONSIDERATION WHEREOF, it is now here ordered and adjudged by this Court that the judgment

of the said District Court in this cause be and the same is hereby, REVERSED; and that this cause be and the same is hereby, REMANDED to said District Court for further proceedings in accordance with the opinion of this Court;

It is further ordered that defendants-appellees pay to plaintiffs-appellants, the costs on appeal to be taxed by the Clerk of this Court.

Entered: April 2, 1986
For the Court: Spencer D. Mercer, Clerk

By: /s/ Illegible
Deputy Clerk

Issued as Mandate: Apr. 29, 1986

(8)

No. 86-142

Supreme Court, U.S.
FILED
OCT 1 1986
JOSEPH F. SPANIOL, JR.
CLERK

In The
Supreme Court of the United States
October Term, 1986

THE CITY OF MONTGOMERY, ET AL.,
Petitioners,

v.

LONNIE BENJAMIN and HAROLD HICKEN,
Respondents.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Eleventh Circuit

MEMORANDUM FOR THE RESPONDENTS IN OPPOSITION

JOHN L. CARROLL
Mercer University
School of Law
Macon, Ga. 31207
(912) 744-2628
Attorney for Respondents

COCKLE LAW BRIEF PRINTING CO., (800) 225-6964
or call collect (402) 342-2831

8 pp

TABLE OF CONTENTS

Page

I. THIS COURT'S PREVIOUS DECISIONS STRIKE THE PROPER BALANCE BETWEEN THE RIGHTS OF GOVERNMENTAL EMPLOYERS AND THE RIGHTS OF THEIR EMPLOYEES 2

II. THE DECISION BELOW TURNS ON THE USUAL FACTS OF THIS CASE 4

III. CONCLUSION 5

TABLE OF AUTHORITIES

Page

CASES

Gardner v. Broderick, 392 U.S. 271 (1968) 2

Garrity v. New Jersey, 385 U.S. 493 (1967) 2, 3

Hester v. City of Milledgeville, 777 F.2d 1492 (11th Cir. 1985) 3

Lefkowitz v. Cunningham, 431 U.S. 801 (1977) 2

Minnesota v. Murphy, 465 U.S. 420 (1984) 2

United States v. Johnston, 268 U.S. 220 (1925) 4

Uniformed Sanitation Men's Association v. Commissioner of Sanitation, 392 U.S. 273 (1968) 2

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On Petition for Writ of Certiorari to the United States Court of Appeals for the Eleventh Circuit

MEMORANDUM FOR THE RESPONDENTS IN OPPOSITION

The petitioners seek to have this court grant certiorari in this case in order to have the court abandon its long standing rule that governmental employees may not be penalized for exercising rights guaranteed them by the

Fifth Amendment to the constitution of the United States. See, e.g. *Lefkowitz v. Cunningham,* 431 U.S. 801, 805 (1977). The petition should be denied because this case presents no grounds upon which certiorari should be granted.

I. THIS COURT'S PREVIOUS DECISIONS STRIKE THE PROPER BALANCE BETWEEN THE RIGHTS OF GOVERNMENTAL EMPLOYERS AND THE RIGHTS OF THEIR EMPLOYEES

In a consistent series of decisions beginning with *Garrity v. New Jersey,* 385 U.S.493 (1967), this court has held that public employees may not be required to give up their Fifth Amendment right against self-incrimination as a condition of their continued employment. See also, *Lefkowitz v. Cunningham,* 431 U.S.801 (1977); *Uniformed Sanitation Men's Association v. Commissioner of Sanitation,* 392 U.S. 273 (1968); *Gardner v. Broderick,* 392 U.S.271 (1968). Recently, this court noted that "These cases make it clear that a state may not impose substantial penalties because a witness elects to exercise his Fifth Amendment right not to give incriminating testimony against himself (citations omitted)" *Minnesota v. Murphy,* 465 U.S.420, 434 (1984).

In articulating these rules, this court has been incredibly sensitive to the needs of both public employers and their employees. Thus, this court's decisions strike the proper balance between an employer's right to have an employee perform his function and the employee's right not to incriminate himself. Under those decisions, an employee may invoke his right against self incrimination in any proceeding. If he is threatened with dismissal for failing to testify, ". . . the privilege against self-incrimina-

tion thus affords a form of use immunity which, absent waiver, automatically attaches to compelled incriminating statements as a matter of law." *Hester v. City of Milledgeville,* 777 F.2d 1492, 1496 (11th Cir. 1985). Thus, the employee, once threatened with dismissal, is free to provide whatever information may be within his knowledge without fear of self incrimination. The decision below is a perfect example of the proper application of the principles of *Garrity* and its progeny. It is eminently correct and need not be reviewed.

The petitioners' main criticism of the decision below is that it ignores the right of a government employer to have an employee testify "voluntarily" as though the word "voluntarily" is a talisman which should be outcome determinative. (Pet. 9n.8:14-17). The petitioners' argument has no basis in the law and misconstrues the facts of this case.[1]

The thrust of petitioners' argument is that a public employer is denied the full benefit of a public employee when that public employee agrees to testify only because he is threatened with dismissal. The employer is denied the full benefit of the employee, according to petitioners, because such testimony then becomes "involuntary and coerced" (Pet. 14). However, such testimony becomes "involuntary and coerced" only in the sense that the em-

---

1. Petitioners also argue that a balancing test should be applied in Fifth Amendment cases involving a governmental employee. (Pet. 17-22). The cases on which the petitioners rely are inapposite to this case because they involve First rather than Fifth Amendment rights. The court has always utilized a balancing test where employees' First Amendment rights were at stake. It has never suggested that Fifth Amendment rights of employees can be balanced away.

ployee would not have offered to testify if he knew that what he said could be used against him. It can thus be "involuntary and coerced" only in the same sense that the testimony of any immunized witness is "involuntary and coerced". No immunized witness testifies "voluntarily". An immunized witness testifies because he has been promised that nothing he says will be used against him. Respondents' position in this case is like that of any immunized witness. They plainly did not want to testify but were obviously willing to do so after they were guaranteed immunity by operation of law. The petitioners' argument, taken to its logical conclusion, would require this court to find that all immunized testimony is "involuntary and coerced". Obviously, such a holding would seriously undermine the effectiveness of many criminal prosecutions.

II. THE DECISION BELOW TURNS ON THE UNUSUAL FACTS OF THIS CASE

The decision below is totally fact bound. The court below recognized that quality when it reversed the lower court "under the unusual facts of this case . . . " (Pet.App. 2a). An analysis of the factual statement in the opinion of the court of appeals underscores the correctness of that analysis. Because this case turns on its facts, it is a particularly inappropriate candidate for a grant of certiorari. As this court has often noted, "We do not grant certiorari to review evidence and discuss specific facts". *United States v. Johnston,* 268 U.S.220, 227 (1925).

———o———

III. CONCLUSION

The decision below has none of the majesty nor malevolence which the petitioners seek to give it. It is a decision based on settled law which revolves around the unusual factual nature of the case. It is also a decision in an area of law which needs no revision by this court. The petition for writ of certiorari should be denied.

JOHN L. CARROLL
Mercer University School of Law
Macon, Ga. 31207
(912) 744-2628

Attorney for Petitioner

Supreme Court, U.S.
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Respondents.

REPLY BRIEF FOR PETITIONERS

H. BARTOW FARR, III *
ONEK, KLEIN & FARR
2550 M Street, N.W.
Suite 350
Washington, D.C. 20037
(202) 775-0184

N. GUNTER GUY, JR.
City Attorney
City Hall
Montgomery, AL 36104

GEORGE B. AZAR
AZAR, CAMPBELL & AZAR
260 Washington Avenue
Montgomery, AL 36197

Counsel for Petitioners

* Counsel of Record

WILSON - EPES PRINTING CO., INC. - 789-0096 - WASHINGTON, D.C. 20001

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REPLY BRIEF FOR PETITIONERS

The basic issue in this case, as framed by the petition and the Memorandum in Opposition recently filed by respondents, is both straightforward and important: whether the City of Montgomery may, consistently with the Constitution, require its police officers to testify voluntarily about investigations that they conduct as part of their official duties. In their Memorandum, respondents argue that the City may not impose that requirement, first, because the decisions of this Court in *Garrity v. New Jersey*, 385 U.S. 493 (1967), and subsequent cases prohibit it and, second, because it would treat employees differently from other witnesses seeking immunity. Neither argument is persuasive.

In our petition we discussed in some detail the reasons why the rule announced in *Garrity* does not apply, and

should not be extended, to cases in which assertion of the privilege against self-incrimination prevents an employee from doing the job that he was hired to do. See Petition at 7-17. In particular, we pointed out that the approach taken by the Eleventh Circuit gives no weight to the important interests of the City in having its police officers testify freely and openly about their investigations. See Petition at 14-17; 19-21.

To answer this contention, respondents take the position that *Garrity* and its progeny "strike the proper balance between an employer's right to have an employee perform his function and the employee's right not to incriminate himself." Mem. in Opp. at 2. The problem with this argument, however, is that neither *Garrity* nor any of the later cases involved "an employer's right to have an employee perform his function." See *Garrity v. New Jersey*, *supra*; *Uniformed Sanitation Men's Association v. Commissioner of Sanitation*, 392 U.S. 273 (1968); *Lefkowitz v. Turley*, 414 U.S. 70 (1973); *Lefkowitz v. Cunningham*, 431 U.S. 801 (1977). In each of those cases the governmental employer was seeking, not to have the employee (or contractor) carry out his assigned duties, but to have him answer questions about his own conduct as part of a specific criminal investigation into that conduct. Thus, in holding that the employees could not automatically be dismissed for failing to answer, the Court had no need to, and in our view clearly did not, establish a much broader rule that employees could also withhold testimony required as part of their jobs. Here, unlike those cases, the dismissal of respondents was not imposed as an ancillary "penalty" for impeding an investigation into their own conduct but, as the district court expressly found, for their "refusal . . . as investigating officers to testify to their investigative findings in a court of law." Pet. App. 15a.

Perhaps as a way to gloss over this difference, respondents also appear to suggest that a government has no

interest in "voluntary" as opposed to "involuntary and coerced" testimony from its employees. Mem. in Opp. at 3-4. Respondents thus argue that their position in refusing to testify willingly is, and should be, no different from that of any witness who agrees to testify only under a grant of immunity. But this argument simply begs the essential issue: whether a government has a right to require more of its police officers than it does of citizens generally. In *Kelley v. Johnson*, 425 U.S. 238 (1976), this Court upheld regulations governing the personal appearance of police officers, observing that the County had "in accordance with its well-established duty to keep the peace, placed myriad demands upon the members of the police force, duties which have no counterpart with respect to the public at large." *Id.* at 245. Likewise, we believe that the City of Montgomery can require its police officers to testify voluntarily about their investigations, or face dismissal for refusing to do so, even though it could not insist upon voluntary testimony from citizens generally or, indeed, upon voluntary testimony from its police officers outside the scope of their assigned duties. The Constitution does not give employees the right to accept the benefits of employment and yet disregard the legitimate obligations of their jobs.

Finally, respondents fall back upon the common assertion that the case involves "unusual facts." Mem. in Opp. at 4, quoting Pet. App. 2a. Quite apart from respondents' (and the court of appeals') silence about what facts are so unusual, this point seems particularly out of place in a case where respondents expressly reject the sort of fact-based balancing test used with regard to other constitutional rights. See Mem. in Opp. at 3 n.1. As we discussed in our petition, *id.* at 17-22, the now-accepted approach in cases involving a possible conflict between the interests of a governmental employer and a claim of individual rights is to examine whether the assertion of the rights will interfere with "the government's legitimate purpose in promot[ing] efficiency and integrity in the

discharge of official duties, and to mainta[in][ing] proper discipline in the public service." *Connick v. Myers*, 461 U.S. 138, 150-51 (1983). What is "unusual" about this case is that, unlike the district court, the court of appeals made no effort to undertake this inquiry. That failure merits the attention of this Court.

CONCLUSION

For the reasons stated in the petition and in this reply brief, the petition for a writ of certiorari should be granted.

Respectfully submitted,

H. BARTOW FARR, III *
ONEK, KLEIN & FARR
2550 M Street, N.W.
Suite 350
Washington, D.C. 20037
(202) 775-0184

N. GUNTER GUY, JR.
City Attorney
City Hall
Montgomery, AL 36104

GEORGE B. AZAR
AZAR, CAMPBELL & AZAR
260 Washington Avenue
Montgomery, AL 36197

Counsel for Petitioners

* Counsel of Record